RECENT DECISIONS.

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ADMIRALTY—LIMITATION OF SHIPOWNER'S LIABILITY—CHARTER.—A vessel was let out by her owners under a time charter containing the usual clauses stipulating delivery and maintenance of the vessel in a seaworthy condition during the charter term. It was *held* that the owners could not limit their liability under the Acts of Congress of March 3, 1851, c. 46 and June 26, 1884, c. 121, for a loss occurring during such term due to her unseaworthiness, even though it occurred without their "privity or knowledge". The ground of the decision was that the owners could not limit their liability against their express personal contract in the charter. *The Julia Luckenbach* (2 C. C. A. 1916) 235 Fed. 388. See Notes, p. 56.

ARMY AND NAVY—ENLISTMENT OF MINOR—RIGHT OF PARENTS TO DISCHARGE.—This was an application for a writ of *habeas corpus* for release from military custody of petitioner's minor son who without their consent had enlisted in the National Guard. The minor was arrested for mis-stating his age on enlistment, but no charges were made. *Held,* the minor should be released, as jurisdiction of the court-martial had not so attached as to deprive the civil court of jurisdiction. *Ex parte Avery* (D. C. E. D. N. C. 1916) 235 Fed. 248.

An enlistment effects a change of status, *In re Grimley* (1890) 137 U. S. 147, and is not, like an ordinary contract, voidable by an infant. *In re Morrissey* (1890) 137 U. S. 157. At common law the enlistment of an infant was not voidable either by the infant or by his parents or guardian. *United States* v. *Blakeney* (1847) 44 Va. 405; see *In re Morrissey, supra.* To-day, by statute, a minor between the ages of eighteen and twenty-one may enlist only with the written consent of parent or guardian, if there be such, whether the enlistment be in the regular army, U. S. Rev. Stat. § 1117, or in the National Guard, 3 Pell's Revisal, § 4895; Act, June 3rd, 1916, § 69. Under such provision it was originally held that the enlistment of a minor without such consent was illegal and void, *In re Chapman* (C. C. 1889) 37 Fed. 327, but the general rule now is that such an enlistment is valid as to the minor but voidable at the instance of his parent or guardian. *In re Morrissey, supra; Solomon* v. *Davenport* (4 C. C. A. 1898) 87 Fed. 318. But an enlisted minor, being *de jure* a soldier, *In re Morrissey, supra,* is amenable to military jurisdiction for military offenses, and his parents are not entitled to his discharge on *habeas corpus* when once military jurisdiction has attached. *Ex parte Dunakin* (D. C. 1913) 202 Fed. 290; *In re Miller* (5 C. C. A. 1902) 114 Fed. 838; *contra, In re Baker* (C. C. 1885) 23 Fed. 30. And if a military arrest has been made before the petition for *habeas corpus* is filed, military jurisdiction has attached though formal charges are not made until after the filing of the petition. *In re Lessard* (C. C. 1905) 134 Fed. 305; *In re Carver* (C. C. 1906) 142 Fed. 623; *United States* v. *Reaves* (5 C. C. A. 1903) 126 Fed. 127. The principal case, therefore, seems illogical, as well as contrary to authority, in granting the minor's release.

CARRIERS—LIBEL—LIABILITY FOR NOTICE OF CONSIGNMENT OF INTOXICATING LIQUOR.—A carrier received an interstate consignment of liquor addressed to the plaintiff, and mailed a notice by post card of its arrival, although the agent sending the notice knew that the goods were not ordered by the plaintiff. An order of the Railroad Commission of Georgia requires such notice to the consignee and provides a penalty for failure to give it inuring to the benefit of the consignee. *Held,* an action of libel against the carrier would not lie. *Knight* v. *Georgia S. W. & G. Ry.* (Ga. 1916) 90 S. E. 81.

The carrier must, at its peril, make delivery to the person designated by the consignor, *Pacific Exp. Co.* v. *Shearer* (1896) 160 Ill. 215, 43 N. E. 816, unless it has been misled by the latter. *Lake Shore etc. Ry.* v. *Hodapp* (1876) 83 Pa. 22. But where the carrier has actual notice of the error in directing, delivery to the proper consignee is required. *Mahon* v. *Blake* (1878) 125 Mass. 477. Furthermore, the Criminal Code § 238, (U. S. 1909) 35 Stat. 1136, prohibits delivery of intoxicating liquor to a consignee known to the carrier to be fictitious. And the knowledge of the agent whose duty it is to send the notice is the knowledge of the carrier. 2 Mechem, Agency (2nd ed.) § 1803. Statutes should not be literally construed when such construction results in an absurdity. *Ryegate* v. *Wardsboro* (1858) 30 Vt. 746; 2 Lewis' Sutherland Statutory Construction § 366. It would seem that the commission's order should be construed as intending to require notice to the person who, in the knowledge of the carrier, is entitled to the goods. A contrary construction would lead to the absurd result that one to whom delivery is neither authorized nor lawful, could recover the statutory penalty for not notifying him of the arrival. In the instant case, however, as there is no allegation that the carrier knew that the plaintiff was not actually intended by the shipper to receive the goods, the carrier was merely performing its duty in notifying the consignee of the arrival of the shipment. As this statement is true, even if defamatory, it is non-actionable. Odgers, Libel & Slander (5th ed.) 181.

CARRIERS—SUPPLEMENTARY HAULING BY SHIPPER NO PART OF TRANSPORTATION.—In answer to a suit for freight charges defendant counterclaimed a sum under an agreement between itself and plaintiff, whereby the former, in consideration of its switching and moving cars within its plant yards, was to be compensated by deduction from the fixed freight rates. *Held,* the agreement was invalid as operating in effect as an unlawful rebate. *New York Cent. & H. R. R. R.* v. *General El. Co.* (1916) 219 N. Y. 227.

Section 1 of the Act to Regulate Commerce, 24 Stat. 379, 34 Stat. 584, 35 Stat. 60, 36 Stat. 539, specifically includes "delivery" within the term "transportation". What constitutes proper delivery by a common carrier must be judged in the light of custom and reason. *Mitchell Coal Co.* v. *Penna. R. R.* (1913) 230 U. S. 247, 263, 33 Sup. Ct. 916. The carrier was at one time expected to make a delivery at the consignee's home or place of business. See *Fenner* v. *Buffalo & State R. R.* (1871) 44 N. Y. 505, 510. At present, where no private siding exists all that can be demanded is delivery to a freight house or terminal. See *Vincent* v. *Chicago & A. R. R.* (1868) 49 Ill. 33, 39; *Loeb* v. *Wabash R. R.* (Mo. App. 1904) 85 S. W. 118. Where sidings exist reasonable delivery may involve trifling departures from the route, and industrial spurs within the carrier's switching limits,

are to be regarded for many purposes as an extension of terminals. *Los Angeles Switching Case* (1914) 234 U. S. 294, 34 Sup. Ct. 814. It seems reasonable to hold that one placement of a car upon an industry track is full performance of the duty to deliver. See *Car Spotting Charges* (1915) 34 I. C. C. R. 608. Further movements, not constituting a part of transportation, are not "services" for the performance of which, under § 15 of the Act to Regulate Commerce, *supra,* the shipper may receive compensation from the carrier, but are purely plant facilities, compensation for which would constitute an unlawful rebate. *Second Industrial R. R. Case* (1915) 34 I. C. C. R. 596, 601; *Crane Iron Works* v. *United States* (1912) 209 Fed. 238, 242; *Chicago & A. R. R.* v. *United States* (1907) 156 Fed. 558; *General El. Co.* v. *New York Cent. & H. R. R. R.* (1908) 14 I. C. C. R. 237; *Solvay Process Co.* v. *Delaware L. & W. R. R.* (1908) 14 I. C. C. R. 246.

CHATTEL MORTGAGES—SALE OF PROPERTY AS CREATION OF TRUST—GARNISHMENT OF TRUST FUNDS.—Mortgagees under various chattel mortgages agreed that the mortgagor might sell the mortgaged chattels provided that a third party collect the proceeds and apply them to the mortgage debts. A judgment creditor of the mortgagor garnished the funds in the hands of the third party. *Held,* the garnishee held under a trust which was superior to the garnishment. *Minneapolis Threshing Machine Co.* v. *Calhoun* (S. D. 1916) 159 N. W. 127.

The consent of the mortgagee that the mortgagor sell the property amounts to a waiver of the lien on the property; *Pratt* v. *Maynard* (1874) 116 Mass. 388; and an agreement that the mortgagor collect the proceeds and apply them to the mortgage debt gives a mortgagee no lien on the funds in the hands of the purchaser or the mortgagor. *Maier* v. *Freeman* (1896) 112 Cal. 8, 44 Pac. 357; *White Mountain Bank* v. *West* (1858) 46 Me. 15; *Smith* v. *Clark* (1897) 100 Iowa 605, 69 N. W. 1011. But where the agreement is that the purchase price be paid to the mortgagee there is a novation or an equitable assignment, depending on whether or not the purchaser is a party to the agreement. *McIntyre* v. *Hauser* (1900) 131 Cal. 11, 63 Pac. 69. Where a third party is to collect and apply the proceeds there is some authority to the effect that a trust is thereby created. *Hoyt* v. *Clemans* (1914) 167 Iowa 330, 149 N. W. 442. It would seem proper for the courts to find that a trust has been created in those cases where the agreement between the parties may fairly be said to contemplate a trust relationship. See *In re Maxwell* (1891) 83 Iowa 590, 50 N. W. 56. The mortgagor has, therefore, no control over the proceeds except to enforce the trust in equity. *Hoyt* v. *Clemans, supra.* Since the mortgagor has no legal rights in the property, at least until a surplus has been ascertained, the creditor can acquire nothing by the garnishment. *Coffield's Ex'rs.* v. *Collins* (1844) 26 N. C. 486. Garnishment, however, is the proper procedure for the purpose of holding the surplus after the specific objects of the trust have been performed. *McLaughlin* v. *Swann* (1855) 59 U. S. 217.

CLOUD ON TITLE—CONVEYANCE BY INFANT TRUSTEE.—The plaintiff paid the consideration for a conveyance of land to the defendants, who were infants, on their parol agreement to reconvey to the plaintiff. The defendants accordingly deeded the land to the plaintiff, who, on alleging that this deed was voidable, was granted a decree for a com-

missioner's deed to perfect her title. *Clary* v. *Spain* (Va. 1916) 89 S. E. 130.

The only cloud on title which equity will relieve is some instrument or other writing which casts doubt upon the validity of the title. 2 Pomeroy, Equitable Remedies, § 724; see *Rigdon* v. *Shirls* (1889) 127 Ill. 411, 19 N. E. 698. A threatened cloud will be enjoined only when the danger is imminent. 2 Pomeroy, *op. cit.* § 726; *Sanders* v. *Village of Yonkers* (1875) 63 N. Y. 489. In the principal case no true cloud on title existed or was imminent, nor was a conveyance to the plaintiff a proper remedy to perfect title unless to enforce some contract or trust relation which existed between the parties. *Reed* v. *Reber* (1871) 62 Ill. 240. But where one takes title, the consideration being paid by another, he holds as trustee, 1 Reeves, Real Prop. § 353; *Binion* v. *Stone* (1663) Freem. Ch. *169, and although in general equity will not enjoin an infant from disaffirming his deed, *Brawner* v. *Franklin* (Md. 1846) 4 Gill. 463; *Jenkins* v. *Jenkins* (1861) 12 Iowa 195, an infant trustee will not be permitted to disaffirm a deed given in execution of the trust. *Prouley* v. *Edgar* (1858) 6 Iowa *353; *Nordholt* v. *Nordholt* (1891) 87 Cal. 552, 26 Pac. 599; *Elliott* v. *Horn* (1846) 10 Ala. 348. In the absence of a statute equity could not force an infant trustee to convey until he became of age, *Goodwyn* v. *Lister* (1735) 3 P. Wms. *387; see *Zouch* v. *Parsons* (1765) 3 Burr. 1794, but in any case where it is proper to execute a deed and the party is incapable or refuses to do so, statutes now generally authorize the court to pass the legal title by decree or by a commissioner's deed. 1 Pomeroy, *op. cit.* § 13; see *Hurt* v. *Jones* (1881) 75 Va. 341; Va. Code (1904) § 3418. Under such a statute, it is proper to order the infant trustee to convey, see *Zouch* v. *Parsons, supra,* or title can be divested from the infant trustee and vested in the proper grantee. *Livingston* v. *Livingston* (N. Y. 1817) 2 Johns. Ch. 537.

DEBT—PAYMENT—APPLICATION—RIGHT TO DIRECT.—A contractor to build a railway station, having given bond to pay all materialmen, sublet part of his work, and although he paid the sub-contractor in full as the work progressed, notifying the plaintiff, the materialman of the latter, of the payments, the sub-contractor in making payments with funds including those so received, directed their application to other accounts between himself and the plaintiff, thus failing to pay the plaintiff for materials used in the railway station. In an action on the bond, *held,* the sub-contractor's direction to apply payments was binding and the defendant is liable. *Crane Co.* v. *Wichita Union Term. Ry.* (Kan. 1916) 158 Pac. 59.

When a creditor holds more than one claim against his debtor, the latter on making a payment has the primary right to direct upon which debt it shall be credited, *Carson* v. *Cook County Liquor Co.* (1913) 37 Okla. 12, 130 Pac. 303, but if the debtor makes no application, the right to apply it accrues to the creditor. *Benson* v. *Reinshagen* (1909) 75 N. J. Eq. 358, 72 Atl. 954. If neither party applies the payment the court will make such application as justice and equity require, *Van Sciever* v. *King* (1913) 176 Mich. 605, 142 N. W. 1069, giving preference to the debt for which the security is most precarious, *Field* v. *Holland* (1810) 10 U. S. 8, 27; *Stone* v. *Rich* (1912) 160 N. C. 161, 75 S. E. 1077; see *Porter* v. *Watkins* (Ala. 1916) 71 So. 687, except in a few states where the contrary civil law rule has been adopted. La. C. C. 1838, § 2162; *McLaughlin* v. *Green*

(1873) 48 Miss. 175. A third person secondarily liable cannot, in general, compel a different application of a payment than that made by the debtor or creditor, *Wyandott Coal etc. Co.* v. *Wyandott Paving etc. Co.* (1916) 97 Kan. 203, 154 Pac. 1012; *Crane Co.* v. *U. S. Fidelity etc. Co.* (1913) 74 Wash. 91, 132 Pac. 872, and this rule still applies where the surety for a contractor guarantees payment for materials furnished, and the proceeds of the latter's undertaking are not applied to the discharge of the debt guaranteed. *People* v. *Powers* (1896) 108 Mich. 339, 66 N. W. 215; *Chicago Lumber Co.* v. *Douglas* (1915) 89 Kan. 308, 131 Pac. 563; *contra, Crane Co.* v. *Pacific etc. Co.* (1904) 36 Wash. 95, 78 Pac. 460. This is on the ground that the guaranty is not conditional upon the debtor's making a particular use of his earnings, which are his absolute property, and it seems that the same reasoning fully justifies the decision in the principal case.

EASEMENTS—WRITTEN REMONSTRANCE SUFFICIENT EVIDENCE OF NON-ACQUIESCENCE.—To an action of trespass *quare clausum fregit,* the defendant pleaded a prescriptive right of way over the plaintiff's close. *Held,* a letter written by the plaintiff to the defendant denying the latter's right while it was still inchoate and forbidding its future use was sufficient evidence of non-acquiescence to prevent the right from accruing. *Dartnell* v. *Bidwell* (Me. 1916) 98 Atl. 743.

The modern doctrine of easements by prescription is based on the fiction of a lost grant, aided by an analogy in equity to the statutory bar to re-entry on land after twenty years of adverse possession. Gale, Easements (9th ed.) 183 *et seq.* The fiction becomes a conclusive presumption, *juris et de jure,* when all the essential elements of the enjoyments are established, but if any one of these is disproved, the presumption is rebutted. *Sargent* v. *Ballard* (1830) 26 Mass. 251; *Rollins* v. *Blackden* (1914) 112 Me. 459, 92 Atl. 521. Thanks to its origin, such a prescriptive right can accrue only if the easement has been enjoyed for the required length of time "under a claim of right, with the acquiescence and knowledge of the owner". *Sargent* v. *Ballard, supra*; *Parker* v. *Foote* (N. Y. 1838) 19 Wend. 309. Acquiescence being thus purely a question of fact, it would seem that written or oral remonstrance brought to the knowledge of the person attempting to perfect an inchoate prescriptive right might well be sufficient evidence of non-acquiescence to prevent it from ripening. *Powell* v. *Bagg* (1857) 74 Mass. 441; *Chicago etc. Ry.* v. *Hoag* (1878) 90 Ill. 339; *Reed* v. *Garnett* (1903) 101 Va. 47, 43 S. E. 182; *Workman* v. *Curran* (1879) 89 Pa. St. 226. Certainly the physical opposition insisted upon in the cases *contra, Lehigh Valley R. R.* v. *McFarlan* (1881) 43 N. J. L. 605; *Kimball* v. *Ladd* (1870) 42 Vt. 747 (distinguishable, since it was a case of negative easement), can do no more than offer evidence of non-acquiescence on the part of the owner of the servient tenement, and would seem a relic of the days when each man had to defend his own rights by force of arms.

EVIDENCE—PEDIGREE—STATEMENTS BY DECEASED ABOUT HIS OWN AGE.—In an ejectment suit it became necessary to show that a deceased person was a minor at a certain time, and, as such, entitled to certain lands which plaintiff claimed by descent. *Held,* the deceased's declarations were admissible to show his age. *Landers* v. *Hayes* (Ala. 1916) 72 So. 106.

Since the case of *Goodright* v. *Moss* (1777) 2 Cowp. 591, pedigree evidence has been admitted, under certain conditions, as an exception to the rule against hearsay. 4 Chamberlayne, Evidence, § 2911; 2 Columbia Law Rev. 170. The exception, as originally laid down, and as still adhered to in many jurisdictions, is intended to apply only where family history, descent, relationship, or some matter of genealogy is the main point in issue. *Eisenlord* v. *Clum* (1891) 126 N. Y. 552, 27 N. E. 1024; *Haines* v. *Guthrie* (1884) 13 Q. B. D. 818; see *People* v. *Mayne* (1897) 118 Cal. 516, 50 Pac. 654. But many jurisdictions to-day have repudiated the idea that the issue must be one of strict genealogy, 2 Wigmore, Evidence, § 1503, and admit hearsay declarations, as valid pedigree evidence for such collateral purposes as to show age in a contract action or under an insurance policy. *Swink* v. *French* (1883) 79 Tenn. 78; *Traveler's Ins. Co.* v. *Henderson Cotton Mills* (1905) 120 Ky. 218, 85 S. W. 1090. In such cases the courts have not made any distinction on the ground that the declarations by the deceased declarant were made in reference to himself. See *Swink* v. *French, supra*; *Traveler's Ins. Co.* v. *Henderson Cotton Mills, supra.* Logically, it would seem that the principal case was correct in admitting hearsay to prove the deceased's age, even though it was not admitted for genealogical proof but was used only to establish a collateral proposition, for such evidence would seem as valid for one purpose as for another. 4 Chamberlayne, Evidence, § 2922; 1 Greenleaf, Evidence, (16th ed.) § 114g. But the efficacy of the procedural rules of evidence depends on their certainty, and if the courts were to stop to discuss the logic of the rules, their effectiveness would be seriously impaired. The states which have broken down the ancient barriers of hearsay were influenced, in a large part, by an error in the first edition of Greenleaf, Evidence, § 104, which, though corrected in the second edition, was cited as law by those courts. Thayer, Cases on Evidence (2nd ed.) 405, n. 3; 1 Greenleaf, Evidence (16th ed.) 203, n. 1. *Houlton* v. *Manteuffel* (1892) 51 Minn. 185, 53 N. W. 541; *Swink* v. *French, supra.*

EVIDENCE—SEDUCTION—CHARACTER OF ASSOCIATES OF PROSECUTRIX.—On a trial for seduction, *held,* one justice dissenting, that evidence of the unchastity of a girl who worked with the prosecutrix was inadmissible, since close association between the two girls was not shown. *Johnson* v. *State* (Tex. Crim. App., 1916) 188 S. W. 426.

Since seduction is a statutory crime, Clark, Crim. Law (3rd ed.) § 128; May, Crimes (3rd ed.) § 197, the rules governing presumptions and admissibility of evidence in seduction trials depend largely upon the statute in each jurisdiction. Where words such as "chaste character" are used, the main issue is the physical chastity of the prosecutrix, *Kenyon* v. *People* (1863) 26 N. Y. 203, and evidence of reputation is admissible, if at all, only to impeach or corroborate testimony of particular acts of lewdness. *State* v. *Prizer* (1878) 49 Ia. 531; *State* v. *Meister* (1912) 60 Ore. 469, 120 Pac. 406. The rule is otherwise where the statute requires the prosecutrix to be of "good repute", *cf. Foley* v. *State* (1896) 59 N. J. L. 1, 35 Atl. 105; *Bowers* v. *State* (1876) 29 Oh. St. 542; but *cf. State* v. *Patterson* (1885) 88 Mo. 88, or where it is silent on the subject. *Jeter* v. *State* (1907) 52 Tex. Cr. 212, 106 S. W. 371. Generally, in criminal cases, evidence of the character of third persons is inadmissible, *Walls* v. *State* (1890) 125 Ind. 400, 25 N. E. 457; *State* v. *Staton* (1894) 114 N. C. 813, 19 S. E. 96, but in some jurisdictions evidence of the character of the prosecutrix's

associates is admitted in seduction trials to show the reputation of the prosecutrix. *State* v. *Bige* (1900) 112 Ia. 433, 84 N. W. 518; *Caviness* v. *State* (1901) 42 Tex. Cr. 420, 60 S. W. 555. While in clear cases, the jury might be warranted in drawing an inference as to the reputation of the prosecutrix from such evidence, still its admission is apt to lead to grave abuses, and should be strictly limited. Sufficiently close association was not shown in the principal case, and the evidence was, therefore, justly excluded.

FOREIGN CORPORATIONS—STATUTORY SERVICE—CAUSE OF ACTION ARISING IN ANOTHER JURISDICTION.—Under a statute sanctioning service on freight and passenger soliciting agents, the defendant, a foreign corporation, was so served in an action for a tort arising in Colorado. *Held,* the statute did not limit the validity of service to causes arising within the state. *Rishmiller* v. *Denver & Rio Grande R. R.* (Minn. 1916) 159 N. W. 272.

Although at common law a corporation could be served only through its principal officer and within its native jurisdiction, see *Reeves* v. *Southern Ry.* (1905) 121 Ga. 561, 49 S. E. 674; *St. Clair* v. *Cox* (1882) 106 U. S. 350, 354, 1 Sup. Ct. 354, it is now generally accepted that a state may establish its particular modes of service. *Denver etc. R. R.* v. *Roller* (9 C. C. A. 1900) 100 Fed. 738; *New York etc. R. R.* v. *Estill* (1893) 147 U. S. 591, 607, 13 Sup. Ct. 444; see *Green* v. *Chicago, etc. R. R.* (1907) 205 U. S. 530, 27 Sup. Ct. 595. If these are reasonable and fairly certain to result in actual notice, *Denver etc. R. R.* v. *Roller, supra*; *St. Clair* v. *Cox, supra,* a foreign corporation by transacting business within the the state impliedly submits to them. *Van Dresser* v. *Oregon etc. Co.* (C. C. 1891) 48 Fed. 202; *Merchants' Mfg. Co.* v. *Grand Trunk Ry.* (C. C. 1882) 13 Fed. 358. Some courts, however, limit the validity of statutory service to causes arising within the particular jurisdiction because a contrary holding would seriously harass a foreign corporation. *Pullman Co.* v. *Harrison* (1899) 122 Ala. 149, 25 So. 697; *Olson* v. *Buffalo etc. Co.* (C. C. 1904) 130 Fed. 1017; see *St. Clair* v. *Cox, supra.* The United States Supreme Court accepts this view where service is through a state officer arbitrarily selected for that purpose, but refuses to decree or imply any extension of the doctrine to the mode of service considered in the principal case. *Simon* v. *Southern Ry.* (1915) 236 U. S. 115, 35 Sup. Ct. 255. It is manifest, however, that to allow a broader rule in the case of voluntary agents, the court would have to avail itself of a distinction far more technical than substantial. The basis for statutory relief is the hardship and inconvenience of the common law rule to injured parties, see *Reeves* v. *Southern Ry., supra*; *St. Clair* v. *Cox, supra,* and when jurisdiction has once been sanctioned by statute, the test therefor is not its general expediency, but whether a defendant is legally found and served in the jurisdiction where the cause of action is asserted. *Reeves* v. *Southern Ry., supra.* Hence, it would seem that the principal case is justified, both logically and by the spirit of the statute, in repudiating the limitation set by the other courts.

HUSBAND AND WIFE—RIGHT OF HUSBAND'S SUBSEQUENT CREDITOR TO WIFE'S SAVINGS FROM HOUSEHOLD ALLOWANCE.—A wife saved money partly from an allowance paid her unreservedly by her husband for running the house, and partly from moneys given by her father for the maintenance of his minor children. On ascertaining the existence

of these savings, the husband agreed to hold them for her, and they were later invested in real property, which was sold under a levy made by one of the husband's creditors. *Held,* the property is not subject to such levy since the purchase money was earned on a contract between the parties. *Regal Realty & Investment Co.* v. *Gallagher* (Mo. 1916) 188 S. W. 151.

At common law the wife was obligated to render household services, Schouler, Domestic Relations, (5th ed.) § 43, and Married Women's Acts have not altered this obligation so as to allow the wife to contract with her husband for these services. *Blaechinska* v. *Howard Mission* (1892) 130 N. Y. 497, 29 N. E. 755. Consequently, it would seem, in the absence of evidence showing gift or trust, that the savings from household funds do not become the wife's separate property but belong to the husband, *Bresnihan* v. *Sheehan* (1878) 125 Mass. 11; *Aaronson* v. *McCauley* (1892) 19 N. Y. Supp. 690; see discussion in *Fretz* v. *Roth* (1905) 68 N. J. Eq. 516, 59 Atl. 676, (later overruled); *contra, Ford Lumber Co.* v. *Curd* (1912) 150 Ky. 738, 150 S. W. 991, the wife holding merely as his agent or fiduciary. *Aaronson* v. *McCauley, supra.* A gift, however, is possible, *Carpenter* v. *Franklin* (1890) 89 Tenn. 142, 14 S. W. 484; *Beck* v. *Beck* (1911) 78 N. J. Eq. 544, 80 Atl. 550, although mere possession by the wife is insufficient to establish the requisite elements. *McDermott's Appeal* (1884) 106 Pa. 358. Such a gift may be void against existing creditors of the husband, *Wolfsberger* v. *Mort* (1903) 104 Mo. App. 257, 78 S. W. 817, but in the absence of fraud will be valid against subsequent creditors. Peck, Domestic Relations, § 47. If there is no gift and the wife surrenders the money, a trust may be established by an express declaration in her favor, *Raybold* v. *Raybold* (1853) 20 Pa. 308, which like a gift would be subject to the general rules as to fraud upon creditors. Perry, Trusts, (6th ed.) § 97n. In the principal case, though it is difficult to see how the court found a contract, a valid gift or trust might be evolved from the evidence, if no fraud or debt existed at the time of the agreement between the parties, a fact which the report of the case fails to disclose. Were such a gift or trust established, the money received from the wife's father would present no new question.

INSURANCE—INDEMNITY—PAYMENT BY NOTE.—The defendant issued an indemnity policy to a corporation, providing for payment of any loss "actually sustained by the assured's payment in money" of a final judgment. An injured employee obtained a judgment against the assured after it had become bankrupt. The bankrupt discounted its note, indorsed by the plaintiff, who was the employee's attorney, gave the plaintiff the money, and received in return a satisfaction of the judgment. The plaintiff kept the money as security for his indorsement, agreeing to give it to the employee if this suit was successful. The bankrupt then assigned its claim to the plaintiff, who brought this suit. *Held,* there was no payment such as was contemplated by the policy. *Eberlein* v. *Fidelity & Deposit Co.* (Wis. 1916) 159 N. W. 553.

In a contract of indemnity against liability there is a right of recovery upon the contract as soon as the liability is incurred, *Johnson* v. *Risk* (1890) 137 U. S. 300, 11 Sup. Ct. 111, but to authorize a recovery on a mere contract of indemnity actual loss must be shown. *Valentine* v. *Wheeler* (1877) 122 Mass. 566; *Miller* v. *Fries* (1901) 66 N. J. L. 377, 49 Atl. 674. The principal case suggests the question as to whether payment by a promissory note is actual loss under an

indemnity policy. On this point it is interesting to observe that a promissory note given and accepted in full satisfaction of a debt is equivalent to a cash payment, *Lee* v. *Clark* (N. Y. 1841) 1 Hill 56; *Bausman* v. *Credit Guarantee Co.* (1891) 47 Minn. 377, 50 N. W. 496, even though the promissor is insolvent at the time of giving the note. *Wilson* v. *Smith* (1867) 23 Iowa 252. Furthermore, payment of a judgment by a note is such actual loss as is contemplated by an indemnity policy, *Taxicab Motor Co.* v. *Pacific etc. Co.* (1913) 73 Wash. 631, 132 Pac. 393; *Kennedy* v. *Fidelity etc. Co.* (1907) 100 Minn. 1, 110 N. W. 97, even where a term of the contract is "payment in money". See *Herbo-Phosa Co.* v. *Philadelphia Casualty Co.* (1912) 34 R. I. 567, 84 Atl. 1093. The transaction, however, must be *bona fide* and in good faith. See *Stenbom* v. *Brown-Corliss* (1909) 137 Wis. 564, 119 N. W. 308. In the principal case the court found that there was no *bona fide* payment and the decision seems correct in view of the peculiar facts of the case.

INSURANCE—SUBROGATION OF INSURER TO SHIPPER'S RIGHTS AGAINST CARRIER.—To an action for the value of a cargo alleged to have been lost by reason of the unseaworthiness of their vessel, the defendants pleaded a clause in the bill of lading giving them the benefit of any insurance effected by the plaintiff; and further, that the underwriters had paid the plaintiff. The plaintiff replied that the alleged payments were merely loans, advanced under a special clause in the policies which limited the liability of the underwriters to the amount not recoverable by the shipper from the carrier, in case the cargo was shipped under a bill of lading subrogating the carrier to the shipper's right to insurance. *Held,* the loans were not admissions by the underwriters of their liability, and the plaintiff could recover the value of the shipment. *The Julia Luckenbach* (2 C. C. A. 1916) 235 Fed. 388. See Notes, p. 53.

LANDLORD AND TENANT—COVENANT NOT TO ASSIGN.—The plaintiff leased property under a covenant forbidding any assignment of the leasehold without the consent of the lessor under penalty of forfeiture and damages. The lessee mortgaged his leasehold, which was sold under foreclosure proceedings to the defendant, the plaintiff subsequently assenting to the transfer. The defendant later assigned it without the lessor's consent. *Held,* the foreclosure sale being an assignment by operation of law, the covenant never was binding upon the defendant and he is not liable for rent after assigning the lease. *Johnston* v. *Flickinger* (Sup. Ct. 1916) 160 N. Y. Supp. 962.

Assuming that the principal case is correct in its holding that the purchaser at the foreclosure sale took as assignee by operation of law, a covenant not to assign, which expressly refers to assigns, runs with the land, *Williams* v. *Earle* (1868) L. R. 3 Q. B. 739; *McEacharn* v. *Colton* [1902] A. C. 104, and is binding upon any assignee, whether by act of the parties or by operation of law. Woodfall, Landlord & Tenant (19th ed.) 189. Since such a covenant closely touches and concerns the land it would seem that it should run with the land and bind assigns whether mentioned or not. 1 Tiffany, Landlord & Tenant, 936; Woodfall, *op. cit.,* 193; 1 Smith, Leading Cases (12th ed.) 80. Although the duty of an assignee to pay rent is founded on privity of estate and he may escape this duty by a reassignment, see 15 Columbia Law Rev. 553; 14 Columbia Law Rev. 88; *Stern* v. *Florence Sewing*

Machine Co. (N. Y. 1876) 53 How. Pr. 478, the defendant in the principal case by assigning in breach of the covenant is liable for damages by non-payment of rent arising from this assignment. But treating the foreclosure sale as a voluntary assignment in breach of the covenant, as seems the sounder view, see 17 Columbia Law Rev. 68, the lessor's subsequent assent amounted to a waiver of this breach. Despite much adverse criticism, the rule in *Dumpor's Case* (1603) 4 Co. 119b, that the licensing of one assignment destroys the condition against assignment forever, applies to covenants as well as conditions. *Siefke* v. *Koch* (N. Y. 1866) 31 How. Pr. 383; *Reid* v. *Wiessner Brewing Co.* (1898) 88 Md. 234, 40 Atl. 877; see 2 Platt, Leases, 270 *et seq.* This rule applies also to a waiver of the breach, see 9 Columbia Law Rev. 627, and it would seem that the covenant in the principal case was thus destroyed. See *Storms* v. *Manhattan R. R.* (1902) 77 App. Div. 94, 79 N. Y. Supp. 60, aff'd. (1904) 178 N. Y. 493, 71 N. E. 3.

LANDLORD AND TENANT—COVENANT NOT TO ASSIGN—SALE UNDER FORECLOSURE OF MORTGAGE.—Where property was leased under a covenant forbidding any assignment of the leasehold without the consent of the lessor, and the lessee mortgaged his leasehold, which was sold under foreclosure proceedings, *held,* such sale being by operation of law was not in violation of the covenant against assignment. *Johnston* v. *Flickinger* (Sup. Ct. 1916) 160 N. Y. Supp. 962.

Although it seems clear that in a jurisdiction where the mortgagor retains the legal title, the mortgaging of the leasehold is not in violation of his covenant not to assign, 1 Tiffany, Landlord & Tenant 930; *Riggs* v. *Pursell* (1876) 66 N. Y. 193; *Crouse* v. *Michell* (1902) 130 Mich. 347, 90 N. W. 32; see *West Shore R. R.* v. *Wenner* (1904) 70 N. J. L. 233, 50 Atl. 408, aff'd. 71 N. J. L. 682, 60 Atl. 1134; *cf. Doe* v. *Hogg* (1824) 4 Dowl. & R. 226, there is a direct conflict whether a sale under foreclosure of such a mortgage violates the covenant. The general rule that the prohibition of the covenant applies only to voluntary assignments as distinguished from assignments by operation of law, 1 Tiffany, *op. cit.* 929; *Smith* v. *Putnam* (1825) 20 Mass. 221, has led to the conclusion in New York that such a sale does not violate the covenant. *Dunlop* v. *Mulry* (1903) 85 App. Div. 498, 83 N. Y. Supp. 477, 1104; *Riggs* v. *Pursell, supra.* But since a sale under foreclosure must have been within the contemplation of the lessee when making the mortgage, it seems that the sale is but part of his own voluntary act and not strictly by operation of law. *Doe* v. *Hawke* (1802) 2 East. 481; *West Shore R. R.* v. *Wenner, supra.* Viewing the transaction as a whole, the mortgage and sale under foreclosure together amount to a voluntary assignment in violation of the covenant, *West Shore R. R.* v. *Wenner, supra*; *cf. Serjeant* v. *Nash etc. Co.* [1903] 2 K. B. 304, and it would seem that this holding is preferable as carrying out the intent of the covenant to protect the lessor from the imposition of a tenant unsatisfactory to him.

LANDLORD AND TENANT—DEPOSIT AS SECURITY FOR COVENANTS OF LEASE —LIQUIDATED DAMAGES OR PENALTY.—Plaintiff made a deposit with defendants, his landlords, as security for performance of the covenants in the lease, and as "liquidated damages" in case of any breach. Plaintiff was dispossessed for non-payment of rent and brings action to recover the deposit, deducting rent due at the time of his removal. *Held,* plaintiff may recover; the deposit was a penalty, since it was

made to secure the performance of a number of covenants of varying importance, including a covenant to pay rent, damages from the breach of which were readily ascertainable. *Fleisher* v. *Friob* (N. Y. Sup. Ct., App. Term, 1916) 56 N. Y. Law Journal 663. See Notes, p. 49.

MORTGAGES—RAILROADS—PRIORITY OF LIEN OF FIRST MORTGAGE BONDHOLDERS OVER SUBSEQUENT CLAIMS.—Intervener, surety on a supersedeas bond to stay execution of a judgment against the mortgagor railroad company, was compelled to pay the amount of the bond when the judgment was affirmed. *Held,* such claim had no priority in foreclosure proceedings over the prior recorded lien of the first mortgage bondholders. *United States Fidelity & Guaranty Co.* v. *United States & Mexican Trust Co. et al.* (8 C. C. A. 1916) 234 Fed. 238.

In general, a recorded mortgage has priority over subsequently acquired liens. But, in the case of railroad companies, it has been held that claims for current expenses incurred within a reasonable time before foreclosure or receivership, have preference over the prior recorded lien of the mortgage bondholders on both the income and corpus of the property. *Blair* v. *St. Louis etc. R. R.* (C. C. 1884) 22 Fed. 471; *Union Trust Co.* v. *Souther* (1883) 107 U. S. 591, 2 Sup. Ct. 295; *Miltenberger* v. *Logansport Ry.* (1882) 106 U. S. 286, 1 Sup. Ct. 140. Such priority rests on the theory that there has been a diversion of the income of the property from the payment of current expenses for the benefit of the bondholders, see *Fosdick* v. *Schall* (1878) 99 U. S. 235, or that expenses so incurred have inured to the benefit of the bondholders by enhancing the value of their security, *Calhoun* v. *St. Louis etc. Ry.* (C. C. 1880) 14 Fed. 9; *Cleveland etc. Ry.* v. *Knickerbocker Trust Co.* (C. C. 1898) 86 Fed. 73; *Union Trust Co.* v. *Souther, supra,* or that public policy requires that the railroads be operated. *Miltenberger* v. *Logansport Ry., supra*; *Williamson* v. *Washington City Ry.* (1881) 74 Va. 624, 641. The recent tendency of the courts, however, is to limit strictly the classes of claims entitled to preference. *Kneeland* v. *American etc. Co.* (1890) 136 U. S. 89, 97, 10 Sup. Ct. 950, 953; *Thomas* v. *Western Car Co.* (1893) 149 U. S. 95, 13 Sup. Ct. 824; *Lackawanna etc. Co.* v. *Farmers etc. Co.* (5 C. C. A. 1897) 79 Fed. 202; *Rodger etc. Co.* v. *Omaha etc. R. R.* (8 C. C. A. 1907) 154 Fed. 629. Since the intervener in the principal case had full notice of the bondholders' lien, and the judgment which he paid would not have been entitled to priority, the result reached is correct on principle and is, moreover, in accord with the weight of authority. *Whiteley* v. *Central Trust Co.* (6 C. C. A. 1896) 76 Fed. 74; *New York Security etc. Co.* v. *Louisville etc. R. R.* (C. C. 1897) 79 Fed. 386.

MUNICIPAL CORPORATIONS—POLICE PENSION ACT—VALIDITY.—Two policemen petitioned for a mandamus to compel the mayor of Quincy, Ill. to set aside, in accordance with statutory requirements, certain public moneys as a police pension fund, so that they, having fulfilled the prescribed term of service, might participate as beneficiaries. *Held,* the statute being valid under the state constitution, the relators are entitled to the relief sought. *People ex rel. Kroner* v. *Abbott* (Ill. 1916) 113 N. E. 696.

Urged against laws requiring municipal corporations to establish pension funds are two articles of frequent occurrence in state constitutions, one prohibiting the authorization of extra compensation to a public officer after a contract has been made or services rendered, Pa. Const., Art. III, § XI, the other forbidding the furnishing of public

moneys to private individuals, Mo. Const., Art. IV, § 46. As violating the latter prohibition, such legislation has been held unconstitutional. *State ex rel. Heaven* v. *Ziegenhein* (1898) 144 Mo. 283, 45 S. W. 1099. In opposition to this narrow view, the argument is advanced that a pension is compensation for services previously rendered, in the nature of pay withheld and therefore no gift. 1 Dillon, Mun. Corp. (5th ed.) § 430. This position seems to disregard the fact that no consideration could have been given for such pay where, as in the principal case, the law was passed to operate retrospectively years after certain of the beneficiaries had entered the service. However, pensions of this type do promote the public welfare by making for efficiency and consequently, it seems difficult to regard the constitutional provisions in question as intended to prevent the enactment of such statutes. It is on the ground, then, of benefit to the public that a law of this kind is upheld, *Trustees etc.* v. *Roone* (1883) 93 N. Y. 313; *State ex rel. Haberlan* v. *Love* (1911) 89 Neb. 149, 131 N. W. 196; *Hughes* v. *Traeger* (1914) 264 Ill. 612, 106 N. E. 431; see *Commonwealth* v. *Walton* (1897) 182 Pa. 373, 38 Atl. 790, provided it does not apply to those whose service has ended before the law was passed. *Mahon* v. *Board of Education* (1902) 171 N. Y. 263, 63 N. E. 1107; see *Mead* v. *Acton* (1885) 139 Mass. 341, 1 N. E. 413.

NEGLIGENCE—DUTY TO LOOK AND LISTEN AT RAILROAD CROSSING—WHEN QUESTION FOR JURY.—A traveller on a highway on approaching a railroad crossing where his view of the tracks was obstructed until he was close to them, saw the flagman on the piazza of his house seventy feet from the crossing and assumed that no train was coming. In a suit for damages sustained in a collision which followed, *held,* the traveller's failure to look and listen was not negligence *per se* and it was for the jury to decide whether he was in the exercise of ordinary care. *Borders* v. *Boston & M. R. R.* (Me. 1916) 98 Atl. 662.

Ordinarily a traveller's failure to look and listen on approaching a railroad crossing is negligence *per se*. *Greenwood* v. *Philadelphia etc. R. R.* (1889) 124 Pa. 572, 17 Atl. 188; *Romeo* v. *Boston & M. R. R.* (1895) 87 Me. 540, 33 Atl. 24. The maintenance of gates or a flagman is only a further precaution, *Union Pacific R. R.* v. *Rosewater* (8 C. C. A. 1907) 157 Fed. 168, which does not excuse a traveller from the duty of care, *Romeo* v. *Boston & M. R. R., supra*; *cf. Welsh* v. *Baltimore & O. R. R.* (1908) 23 Del. 140, 76 Atl. 50, and according to the best considered cases the fact that a gate is raised, *Ellis* v. *Boston etc. R. R.* (1897) 169 Mass. 600, 48 N. E. 839, or the flagman absent, *Schaub* v. *Kansas City etc. Ry.* (1910) 133 Mo. App. 44, 113 S. W. 1164; *Hodgin* v. *Southern Ry.* (1906) 143 N. C. 93, 55 S. E. 413, is not an assurance of safety. Ordinarily mere reliance on the performance by the railroad of its duty is not sufficient to take the case out of the general rule. *Brommer* v. *Pennsylvania R. R.* (3 C. C. A. 1910) 179 Fed. 577; *Cadwalader* v. *Louisville etc. Ry.* (1891) 128 Ind. 518, 27 N. E. 161; and see *Berry* v. *Pa. R. R.* (1886) 48 N. J. L. 141, 4 Atl. 303. But in the principal case misleading conduct of the flagman would seem to be an extraordinary fact such as has been held to justify the court in refusing to apply the usual presumption and in referring the question of contributory negligence to the jury. *Chicago etc. R. R.* v. *Hedges* (1885) 105 Ind. 398, 7 N. E. 801; *Pennsylvania Co.* v. *Stegmeier* (1889) 118 Ind. 305, 20 N. E. 843; *Pennsylvania Co.* v. *Rudel* (1881) 100 Ill. 603; *cf. Smedis* v. *Brooklyn etc. R. R.* (1882) 88 N. Y. 13.

PARENT AND CHILD—EMANCIPATION.—The defendant permitted his minor daughter to live away from home, earning her own living, and when it became necessary for her to have an operation performed, the father was informed by the girl's sister and assented to her, but not to the doctor. *Held,* there was only a partial emancipation of the sick daughter and the father is liable for necessary medical attendance. *Wallace* v. *Cox* (Tenn. 1916) 188 S. W. 611.

The test of emancipation is the destruction of the parental and filial relations by the entire surrender by the parent of his rights to the care, custody, service and earnings of the child and the renunciation of his parental duties. *Lowell* v. *Newport* (1876) 66 Me. 78. Where a parent permits a minor to carry on a business of his own and exercises no control over his earnings, emancipation may be inferred, *Jacobs* v. *Jacobs* (1905) 130 Iowa 10, 104 N. W. 489; *Giovagnioli* v. *Ft. Orange Const. Co.* (1911) 148 App. Div. 489, 133 N. Y. Supp. 92, but this inference may be limited or rebutted by proof of intention on the part of the parent to retain any control. *Blivin* v. *Wheeler* (1903) 25 R. I. 313, 55 Atl. 760; *Porter* v. *Powell* (1890) 79 Iowa 151, 44 N. E. 295; see Schouler, Domestic Relations, (5th ed.) § 267a. As the father was consulted and assented in the principal case, it would seem a fair inference that he intended to retain control and that emancipation was not complete. *Cf. Porter* v. *Powell, supra;* see *Searsmont* v. *Thorndike* (1885) 77 Me. 504, 1 Atl. 448. The rights of the parent in his child being reciprocal with his duties towards the child, *Hollingsworth* v. *Swedenborg* (1875) 49 Ind. 378, a complete emancipation by destroying the parent's rights relieves him of his obligations to support the child, Schouler, *op. cit.* § 268, but it is obvious that the retention of any control by the parent will continue his common law liability. *Porter* v. *Powell, supra.*

PLEADING—ACTION FOR WRONGFUL DEATH—AMENDMENTS.—The plaintiff brought an action, as administrator, for damages for the negligence of the defendant resulting in decedent's death. The Statute of Limitations had expired by the time the trial was called, at which time plaintiff moved to amend the complaint and substitute the widow as plaintiff and the children as beneficiaries, under the Statute allowing them the damages. The motion was denied on the ground that the amendment tended to introduce a new cause of action after the Statute of Limitations had run. *Alexander* v. *Wilkes-Barre Ry.* (D. C. M. D. Pa. 1916) 235 Fed. 461.

Where the original cause of action is not changed, the courts are liberal in allowing amendments even after the Statute of Limitations has run, on the ground that the amendment is a continuation or a restatement of the cause of action stated in the original complaint. *Harlan* v. *Loomis* (1914) 92 Kan. 398, 140 Pac. 845; *Sanger* v. *City of Newton* (1883) 134 Mass. 308; *Stoner* v. *Erisman* (1903) 206 Pa. 600, 56 Atl. 77; Will's Gould, Pleading, (6th ed.) 136. But the general rule forbids an amendment which will substantially change the cause of action, *Ross* v. *Cleveland etc. Co.* (1901) 162 Mo. 317, 62 S. W. 984; Will's Gould, Pleading, (6th ed.) 133, and, *a fortiori,* this is true where the Statute of Limitations would bar the action which the amendment sets forth. *Kansas City* v. *Hart* (1899) 60 Kan. 684, 57 Pac. 938; *Eggleston* v. *Beach* (1890) 11 N. Y. Supp. 525, aff'd. (1891) 128 N. Y. 592, 28 N. E. 251; *Box* v. *Chicago, R. I. & P. Ry.* (1899) 107 Iowa 660, 78 N. W. 694; see *Stoner* v. *Erisman, supra.* This would seem to be the correct rule since the amendment cannot be made to relate back to

the original complaint where they are grounded on totally different claims. Since the statutory action given to the widow and children of the deceased is a new and distinct action from that given to the administrator, 15 Columbia Law Rev. 621, the court in the principal case is in accord with authority and reason in denying the motion to amend.

SALES—STOPPAGE IN TRANSITU—LIABILITY OF VENDOR UPON EXERCISE OF THE RIGHT.—The defendant, the vendor, upon learning of the insolvency of the vendee, gave notice to the plaintiff, the carrier, to stop the goods in transit. The plaintiff obeyed and held the goods for the defendant, but for reasons of his own, the defendant refused to give any directions as to the disposition of the goods. The plaintiff brought an action for damages on the ground that the defendant was under an obligation to take the goods and discharge the carrier's lien. *Held,* judgment for the plaintiff. *Booth Steamship Co.* v. *Cargo Fleet Iron Co. Lim.* (Ct. of App. 1916) 115 L. T. R. 199. See Notes, p. 44.

TORTS—LIABILITY OF SERVANT—NONFEASANCE.—The plaintiff attempted to board a train on the side where the vestibules were closed. After the train had started his dangerous situation was made known to the conductor, who made no effort to rescue him and the plaintiff fell off and was badly injured. In a suit against the conductor, *held,* one who undertakes to operate a train owes a duty to the general public as well as to the passengers, and when failure to perform such a duty results in injury, such failure amounts to a misfeasance for which the conductor is individually liable. *Waitt* v. *Sewell* (Ga. 1916) 90 S. E. 94.

It is generally stated that an agent is not personally liable for wrongs arising from his nonfeasance. See 3 Columbia Law Rev. 116. Recently, the courts have come to recognize the unsoundness of the proposition that an agent may escape liability for his torts on the ground that he has a contractual relationship with a principal who is also liable. *Mayer* v. *Thompson-Hutchinson Bldg. Co.* (1894) 104 Ala. 611, 16 So. 620. In some cases the attempted distinction between a nonfeasance and a misfeasance has been entirely repudiated and the agent held personally liable when his wrongful act has been the proximate cause of the injury. *Lough* v. *John Davis & Co.* (1902) 30 Wash. 204, 70 Pac. 491; see *Ellis* v. *Southern Ry.* (1905) 72 S. C. 465, 52 S. E. 228. In others, including the principal case, the courts have indulged in a solemn game of logomachy, attempting to sustain an intangible distinction, yet reaching the sound result by declaring that the failure to exercise the due care which the rights of others required, is a misfeasance. *Southern Ry.* v. *Grizzle* (1906) 124 Ga. 735, 53 S. E. 244. The duty to exercise such care is imposed upon all persons to whom the personal safety of others is largely intrusted, and especially upon all carriers. See Langdell, Classification of Rights & Wrongs, 13 Harvard Law Rev. 537, 545. In the principal case, after the conductor had been notified of the plaintiff's precarious situation, it was his duty to act with reasonable promptness and to adopt such means as were available and appropriate to rescue him, see *Graham* v. *Chicago & N. W. Ry.* (1906) 131 Iowa 741, 107 N. W. 595, and as an agent who has undertaken the full control of a particular work, he has assumed a duty, for any breach of which he is liable. *Osborne* v. *Morgan* (1881) 130 Mass. 102.

USURY—"SALE" OF ACCOUNTS RECEIVABLE WITH GUARANTY.—The K. Co. "sold" its accounts receivable to the plaintiff at a discount beyond the legal rate of interest, part of the purchase price to be paid immediately, and the rest when the accounts were collected, the K. Co. guaranteeing the payment of the accounts. The defendant was sued on his guaranty of the performance of the agreement by the K. Co. and interposed the defense of usury. *Held,* the transaction was merely a loan on the security of the accounts as collateral and therefore usurious. *Mercantile Trust Co.* v. *Kastor* (Ill. 1916) 112 N. E. 988. See Notes, p. 51.

VENDOR AND PURCHASER—EXECUTORY CONTRACT FOR SALE OF LAND—LEVY ON VENDOR'S INTEREST.—A vendor had contracted to sell land to a vendee, who had paid part of the purchase price, but was in default and had abandoned the land. The defendant brought an action against the vendor, and issued an attachment on the land. The action was prosecuted to judgment, and the defendant claimed the right to redeem from the plaintiff, the assignee of a certificate of sale on foreclosure of a mortgage on the land, who was suing to obtain his sheriff's deed and quiet his title. *Held,* defendant might redeem. *Reid* v. *Gorman* (S. D. 1916) 158 N. W. 780. See Notes, p. 46.

WILLS—SPECIFIC LEGACY OF MORTGAGE—INTEREST.—Under a will reading "I give the mortgage * * * on which there is now unpaid" such a sum, it was *held* that the legatee was entitled to the interest accrued thereon at the time of the death of the testator as well as to the interest accruing since the death of the testator. *Matter of Althaus* (1915) 94 Misc. 43, 158 N. Y. Supp. 990.

Interest on a general legacy does not begin to run, aside from statutes, until a year from the death of the testator. *Warwick* v. *Ely* (1899) 59 N. J. Eq. 44, 44 Atl. 666. But since this was a particular mortgage it was a specific legacy and, therefore, the court followed the general rule in allowing the interest from the time of the testator's death. 2 Woerner, Administration (2nd ed.) § 458; 2 Schouler, Wills, Executors & Administrators (5th ed.) § 1480; *Smith* v. *McKitterick* (1879) 51 Iowa 548, 2 N. W. 390. As to the question of passing the interest already accrued on the legacy at the time of the death of the testator, the courts have made a distinction between cases where a sum of money is bequeathed, secured by some bond or note or mortgage, and where the bond or note or mortgage is itself bequeathed. In the former case, the accrued interest does not pass with the legacy, *Roberts* v. *Kuffin* (1740) 2 Atk. *112; see *Fleming* v. *Carr* (1890) 47 N. J. Eq. 549, 22 Atl. 197, and in the latter such interest does pass. *Fleming* v. *Carr, supra*; *Gibbon* v. *Gibbon* (1853) 13 C. B. *205, 17 Jur. 416; *Petition of Mowry* (1890) 16 R. I. 514, 17 Atl. 553; *Harcourt* v. *Morgan* (1838) 2 Keen 274. This seems to be a valid distinction, for when the testator gives the sum of money, he intends to give that sum only; whereas when he gives the security itself, he evidently must intend to pass the security as it is, viz., with accrued interest. In the principal case there was a bequest of the specific mortgage, and the court was therefore correct in giving the legatee the accrued interest.

WITNESS—COMPETENCY OF JUDGE TO TESTIFY AS TO STATEMENT MADE IN PROCEEDINGS BEFORE HIM.—On appeal from a probate court's disallowance of a will the judge at the first hearing was allowed to testify

concerning a statement made in the proceedings before him. On a second appeal, *held*, it was not error to allow the testimony of the judge. *Hale* v. *Wyatt* (N. H. 1916) 98 Atl. 379.

It is now generally accepted, though there was probably an old rule *contra*, Wigmore, Evidence § 1909, *Proceedings against Five Popish Lords* (1680) 7 How. St. Tr. 1218, 1384, that in the absence of express statutory provision to the contrary, La. Rev. Stat. § 3945; Ark. Stat. § 3144, a judge may not be a witness in a case over which he is presiding. *Morss* v. *Morss* (1851) 11 Barb. 510; *State* v. *DeMaio* (1903) 69 N. J. L. 590, 55 Atl. 644; *Shockley* v. *Morgan* (1897) 103 Ga. 156, 29 S. E. 694; see *Duke of Buccleuch* v. *Met. Board* (1872) L. R. 5 E. & I. App. 418, 433; *contra, Hopkins* v. *Scott* (1894) 38 Neb. 661, 57 N. W. 391. The rule is based both on a regard for the essential dignity of the court and the impartiality of the hearing, *Rogers* v. *State* (1894) 60 Ark. 76, 29 S. W. 894, and considerations of the practical difficulties of swearing in the witness and regulating his testimony. *Morss* v. *Morss, supra.* Whatever may be the soundness of the rule, 5 Chamberlayne, Evidence, § 3671, none of the reasons given for it seems to apply to the cases where the judge is not presiding. While sometimes under such circumstances a judge has not been allowed to testify, *Noland* v. *People* (1905) 33 Colo. 322, 80 Pac. 887, the reasons seem to be not the incompetency of the judge but the inadmissibility of the evidence, *Agan* v. *Hey* (1883) 30 Hun 591, as where the testimony would have contradicted an instrument the witness had already certified as magistrate. See *Highberger* v. *Stiffler* (1863) 21 Md. 338; *Corby* v. *Wright* (1881) 9 Mo. App. 5. Since in the principal case the evidence was unquestioned, the court seems correct in admitting the testimony of the judge. *State* v. *Duffy* (1889) 57 Conn. 525, 18 Atl. 791; *State* v. *Bringgold* (1905) 40 Wash. 12, 82 Pac. 132; *cf. Jackson* v. *Humphrey* (1806) 1 Johns. 497; *contra, State* v. *Dyer* (1904) 21 Del. 88, 58 Atl. 947.